STATE OF MICHIGAN

COURT OF APPEALS

THUMB ELECTRIC COOPERATIVE of MICHIGAN,

Plaintiff-Appellant,

v

ROBERT C. WALKER and WILLIAM C. WALKER,

Defendant-Appellees.

UNPUBLISHED
December 6, 2002

No. 230804
Sanilac Circuit Court
LC No. 00-027379-CZ

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiff Thumb Electric Cooperative of Michigan (Cooperative) appeals as of right from the circuit court's order confirming an arbitration award in favor of defendants Robert C. Walker and William C. Walker (the Walkers).[1] We affirm in part and reverse in part.

I. Introduction

This appeal arises from an order granting the Walkers' motion to confirm an arbitration award in their favor in the amount of $350,000. In February 1998, the Walkers filed suit against Cooperative, alleging that stray voltage caused damage to their dairy cattle in the form of decreased milk production. The Walkers claimed that the stray voltage was caused by Cooperative's negligence in delivering electrical service to the farm. The case was subsequently dismissed when the parties agreed to submit their dispute to binding arbitration.

The arbitration agreement contained the following paragraph regarding the standard of care to be applied in this case:

> The parties agree that *Carpenter v Consumers Power Company* 230 Mich App 547, 584 NW2d 375 (1998) at paragraph 26, contains the statement of the law

[1] Cooperative was named defendant in the initial action in the lower court, but appears as the plaintiff/appellant on appeal. Therefore, in order to avoid any confusion, the parties will be referred to by their designated name throughout the remainder of this opinion.

> describing the negligence standard of care for this case and *shall remain binding on all parties*.[2] [Emphasis added.]

The arbitration panel issued its arbitration award on August 8, 2000. A majority of the panel found in favor of the Walkers in the sum of $350,000.[3] However, on July 26, 2000, the Michigan Supreme Court issued an opinion reversing *Carpenter*. *Case v Consumers Power Co*, 463 Mich 1; 615 NW2d 17 (2000).[4]

Thereafter, Cooperative filed an application to vacate the arbitration award on the ground that the arbitrators exceeded their powers by failing to apply controlling law as clarified in the *Case* decision. Cooperative argued that the Supreme Court's holding in *Case* lowered the standard of care to be applied in stray voltage cases and that the duty delineated in *Case* was binding on the arbitrators in this case because it was the law in Michigan prior to the issuance of a decision. Cooperative therefore concluded that the arbitration award must be vacated because it was based on the existence of a duty in excess of that allowed by the Supreme Court, and thus, contrary to law. At the same time, the Walkers brought a motion to confirm the arbitration award and enter judgment in the case, arguing that Cooperative had provided no basis on which to vacate the arbitration award. Rather, the Walkers asserted that as a matter of contract law, the parties agreed to the law of the case and that it would remain binding on the parties despite the ramifications of a decision on appeal. The Walkers therefore concluded that the court could not revisit the merits of the decision and the arbitration award must be confirmed.

Following a hearing on the parties' respective motions, the circuit court granted the Walkers' motion to confirm the arbitration award, finding that under the arbitration contract, the parties specifically agreed that the standard of care as contained in *Carpenter* would remain the

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[2] It appears that the parties were referring to the following jury instruction based on *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993):

> It is well settled that electrical energy possesses inherently dangerous properties requiring expertise in dealing with its phenomena. Therefore Consumers Power Company has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. Consumers Power Company, being engaged in the transmission of electricity, is bound to anticipate ordinary use of the area surrounding lines and to appropriately safeguard an attendant risk. The test to determine whether a duty was owed is not whether Consumers Power Company should have anticipated a particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work or pleasure. [*Carpenter, supra* at 558.]

[3] The arbitration award is signed by all three arbitrators and contains no explanation as to how the panel came to its decision.

[4] In *Case*, the Court determined that the proper standard of care applicable to providers of electricity in stray voltage cases did not require providers to inspect and repair its electrical lines, but concluded that a jury must determine the precise actions required to meet the reasonable care standard. *Case, supra* at 3, 9-11.

binding law in this case. The court believed it was obligated to follow the language of the contract and that the arbitrators properly followed the law as provided in the contract. In support of its decision, the court likened the issue to that of a choice of law situation and found that where parties agree to the applicable law, those contracts are valid and binding. Accordingly, the circuit court confirmed the arbitration award and entered judgment in favor of the Walkers. This appeal by Cooperative followed.

II. Analysis

Cooperative argues on appeal that the circuit court erred in refusing to vacate the arbitration award where the arbitrators exceeded the scope of their authority when they ignored controlling principles of law as contained in the *Case* decision. We disagree because, as discussed below, this case does not involve statutory arbitration. Rather, because of the terms of the arbitration agreement, this case must be resolved by the standards governing common-law arbitration. As detailed below, this is a critical distinction, and one which the parties never addressed.

Our Courts have long distinguished between "statutory" and "common-law" arbitration. *FJ Siller & Co v Hart*, 400 Mich 578, 581; 255 NW2d 347 (1977); *McGunn v Hanlin*, 29 Mich 475, 479-480 (1874); *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999). To be considered statutory arbitration, the arbitration agreement must contain language affording the parties the opportunity to have a judgment entered on the ultimate award. Specifically, "'[t]he Michigan arbitration statute provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable *if the agreement provides that a circuit court can render judgment on the arbitration award.*'" *Id.*, quoting *Tellkamp v Wolverine Mut Ins Co*, 219 Mich App 231, 237; 556 NW2d 504 (1996) (emphasis supplied), citing MCL 600.5001. See also *Brucker v McKinlay Transport*, 454 Mich 8, 14-15; 557 NW2d 536 (1997); *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 174; 550 NW2d 608 (1999). As such, Michigan law provides that parties who want their arbitration to be governed by the rules set forth in MCL 600.5001 *et seq*. must clearly evince that intent with a contract provision providing for a circuit court to enter a judgment on the arbitration award. *Hetrick, supra* (citations omitted). For those agreements that do not invoke such magical language, the parties are subject to the rules governing common-law arbitration. *Id.*

The Legislature has also instructed that *statutory* arbitration "is to be conducted in accordance with the rules of the Michigan Supreme Court." *Dohanyos, supra*, citing MCL 600.5001. Accordingly, the Court specified in its rule-making capacity that "[t]his rule governs statutory arbitration under MCL 600.5001 – 600.5035. . . ." MCR 3.602(A). Likewise, then, parties to an arbitration can only invoke the rules within MCR 3.602 if the arbitration agreement calls for statutory arbitration, i.e., it contains a provision indicating that a circuit court can enter judgment on the award.

The parties' arbitration agreement in this case does not manifest an intent to have the arbitration award enforceable by a circuit court. Not only is the written agreement devoid of any statement that "a judgment of any circuit court shall be rendered upon the [arbitration] award," MCL 600.5001(1), there is also no language within the agreement that reveals *any* intention to proceed to circuit court to enter judgment on this award. As such, this case involves common-

law arbitration, and the rules and procedures regarding "statutory arbitration" are simply not applicable. *Hetrick, supra*; *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996). "Hence, the arbitrators' authority is governed solely by the terms of the arbitration agreement." *Id.*

We also hold that because the standards articulated in *DAIIE v Gavin*, 416 Mich 407; 331 NW2d 418 (1982), which both parties heavily relied upon, specifically apply to statutory arbitration, they are inapplicable in this case. *Beattie, supra* at 417-418. Further, we decline to address the question of whether the error of law standard contained in *Gavin, supra*, can be extended to common-law arbitration as the issue was not raised by the parties on appeal and any decision to extend *Gavin* beyond its plain terms should be left to our Supreme Court.

With that being established, common-law arbitration is not subject to as strict a standard of review as is statutory arbitration. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992); *Davis v National American Ins Co*, 78 Mich App 225, 232; 259 NW2d 433 (1977). Rather, "[j]udicial review is limited to instances of bad faith, fraud, misconduct or manifest mistake." *Emmons, supra.* A common-law arbitration award will be upheld absent "'(1) fraud on the part of the arbitrator; (2) fraud or misconduct of the parties affecting the result; (3) gross unfairness in the conduct of the proceedings; (4) want of jurisdiction in the arbitrator; (5) violation of public policy; (6) want of the entirety of the award.'" *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 250; 230 NW2d 556 (1975), quoting *Frazier v Ford Motor Co*, 364 Mich 648, 655; 112 NW2d 80 (1961).

Cooperative's contention that the arbitrators exceeded the scope of their authority when they ignored controlling principles of law is not sustainable under the standard of review applicable in this case. An arbitration award will not be held invalid under the common law merely because it is unjust, inadequate, excessive, or contrary to law because arbitrators are authorized to determine both the facts and the law.[5] *Tripp, supra* at 251. We will not inquire as to whether those determinations are right or wrong. *Id.* Accordingly, the trial court did not err in confirming the arbitration award on this basis.

Cooperative also argues that the arbitrators breached their contract and committed misconduct or bias by failing to make factual findings as requested. Although we question how the failure to make written factual findings constitutes misconduct or bias on the part of the arbitrators, see *id.* at 250; *Frazier, supra* at 655-656, it is nonetheless well-settled that arbitrators derive their power solely from the arbitration agreement between the parties and are bound to act within the terms of the agreement. *Union Lake Associates Inc v Commerce & Industry Ins Co*, 89 Mich App 151, 157; 280 NW2d 469 (1979). Cooperative concedes that the written arbitration agreement did not contain a requirement that the arbitrators provide a written factual basis for their decision. Thus, we are unable to conclude that the arbitrators breached their contract or acted outside the scope of the agreement by failing to provide written findings of fact. See

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[5] As such, Cooperative's argument that the failure to apply controlling case law violates public policy requiring strict adherence to "*stare decisis*" must fail. Cooperative's argument also misapprehends the standard for setting aside arbitration awards in violation of public policy. See *Gogebic Medical Care Facility v AFSCME*, 209 Mich App 693, 697; 531 NW2d 728 (1995).

generally 5 Am Jur 2d, Arbitration and Award, § 127, p 614. In any event, the arbitrators' findings of fact are not proper subjects for judicial review. *Tripp, supra* at 251.

Last, Cooperative argues that the arbitrators lacked jurisdiction to retroactively amend the arbitration award to add interest. However, the record indicates that it was the trial court, not the arbitrators, that modified the arbitration award to add interest.[6] The trial court did so in reliance on a letter from a member of the arbitration panel indicating that it was the "panel's intention" that the Walkers would be entitled to add statutory interest to the award from the date of filing the complaint. We hold that the trial court's order modifying the award to add interest was improper.

Again, "[i]t is a well settled arbitration principle that the scope of the agreement between the parties dictates the issues to be addressed by the arbitrators." *Union Lake, supra.* See, also, *Beattie, supra* at 577. Furthermore, "'[i]t is an equally fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of arbitration.'" *Id.* at 578 (citations omitted). In that regard, a court "'cannot usurp the functions of the arbitrators or substitute its judgment for theirs, yet, where the mistake or error relied on is clear and the correct result which should have been reached but for the mistake or error can be readily ascertained, equity may . . . rectify the award and decree performance according to the true intent . . . .'" *Tripp, supra* at 255-256 (citations omitted).

With the foregoing principles in mind, the scope of the arbitration agreement in this case dictated that the arbitrators were authorized to award interest if they deemed such an award appropriate. Specifically, paragraph three of the arbitration agreements states: "No costs will be awarded to either side. The only exceptions will be costs previously ordered by the Circuit Court . . . and pre-judgment interest, *if deemed appropriate by the arbitrators,* to run from the date of the filing of the complaint." (Emphasis added). However, despite this clear authority, the arbitration award makes no mention of a specific finding of interest, but only a blanket award of $350,000. Accordingly, we are unable to determine from the face of the award that any error exists with regard to a finding of interest. Accordingly, we find that the trial court "usurped" the functions of the arbitrators as determined by the arbitration agreement between the parties when it substituted its judgment for theirs and determined and applied a rate of interest to the award. Thus, we affirm the trial court's order confirming the arbitration award in the amount of $350,000, and reverse that portion of the trial court's order amending the award to add interest.

The Walkers reliance upon MCL 600.6013(6) in support of their argument that the trial court did not commit error in adding interest is unpersuasive. Section 6013 allows interest on a money judgment recovered in a civil action. However, an arbitration agreement is a contract by which the parties forgo their rights to proceed in a civil court in lieu of submitting their dispute to a panel of arbitrators. *Beattie, supra* at 577. Thus, the parties relinquished their right to the benefits of section 6013 when they agreed to binding arbitration, specifying that the *arbitrators* would award interest, if they deemed it appropriate. Moreover, because the parties did not

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[6] The court entered a final order confirming the arbitration award in the amount of $415,884.27 to reflect statutory interest on the award.

manifest an intent to have a judgment entered upon the award in any civil court, which would have invoked the rules of statutory arbitration, it seems that they expressed no intention for the trial court to provide for an award of interest on a money judgment under MCL 600.6013.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra